Filed 6/26/09 In re Danielle R. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re DANIELLE R., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. KRISTIAN R., Defendant and Appellant.	G041317 (Super. Ct. No. DP014404) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Dennis Keough, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Marsha F. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minor.

* * *

I.

INTRODUCTION

Kristian R. (Mother) is the mother of Danielle R., who was born in January 2005. Danielle was taken into protective custody in November 2006 when Mother and Danielle's father were arrested. Mother appeals from the order denying her petition under Welfare and Institutions Code section 388 (all further code references are to the Welfare and Institutions Code unless otherwise specified) and the order terminating parental rights pursuant to section 366.26. Danielle's father, Daniel R. (Father), has not appealed.

Mother contends (1) the juvenile court's denial of her section 388 petition was based on speculation, and (2) substantial evidence did not support the court's finding the parental benefit exception of section 366.26, subdivision (c)(1)(B)(i) did not apply. We conclude the juvenile court's denial of Mother's section 388 petition was based on a reasonable inference drawn from facts established in the case and substantial evidence supported the finding the parental benefit exception did not apply. Accordingly, we affirm.

II.

FACTS AND PROCEEDINGS IN THE JUVENILE COURT

A. *Detention and Jurisdictional Hearing*

On November 9, 2006, the Orange County Social Services Agency (SSA) detained Danielle when Mother and Father were arrested on outstanding warrants. Danielle had been living with her parents in a cluttered van. Folding knives were found beneath the front driver's seat. The child seat had no cushion and was secured only by a loose strap tied to the back of the seat. Danielle was filthy and emitted a strong, foul odor.

The next day, Mother told the social worker she and Father had been together for nine years but had not married. They were homeless for a month and had been living in motel rooms or the family van. Mother had not taken Danielle to a medical professional since she was born, and Danielle had received no immunizations. Mother claimed to have stopped using "speed" in 2003 but said she had been in a sober living home in April or May 2005.

A juvenile dependency petition, filed on November 13, 2006, alleged failure to protect (§ 300, subd. (b) [count 1]), no provision for support (§ 300, subd. (g) [count 2]), and abuse of sibling (§ 300, subd. (j) [count 3]). Danielle was ordered detained on November 14 and was placed in a foster home on December 9.

Mother's parental rights to four other children had been terminated. Mother's parental rights to Danielle's half sibling Rudy D. were terminated in May 1999 after reunification efforts failed. Mother's parental rights to Danielle's siblings, Daniel R., A.R., and Janie R., were terminated in February 2005 after Mother had been denied reunification services.

A social worker again interviewed Mother in December 2006. Mother claimed she was not then using drugs but had used drugs in November. She had been using drugs since high school and her longest period of sobriety was two years. She used drugs "'frequently throughout the day'" and had been addicted to methamphetamine for about two years. Mother had participated in substance abuse treatment services in 2004 but did not complete the program.

Father also acknowledged he was addicted to methamphetamine and his addiction caused him to neglect Danielle, Mother, and himself. Father explained that Danielle was not left unattended when he and Mother used drugs because "'[Mother] would get high and I'd watch the baby. We'd take turns.'"

By the end of 2006, neither Mother nor Father had started drug testing despite having received referrals.

On January 2, 2007, the juvenile court found the allegations of counts 1 and 3 of the petition true by a preponderance of the evidence and ordered Danielle declared a dependent child of the court pursuant to section 360, subdivision (d). Under section 361.5, subdivision (b)(10) and (13),[1] the court denied reunification services for Mother and Father. The court permitted Mother and Father to have twice-weekly monitored visits with Danielle, and authorized funding for drug testing for both parents, to be terminated if either parent tested positive or had a missed or diluted test. A section 366.26 hearing was set for May 1, 2007.

B. *Placement with Maternal Grandmother and First Section 388 Petition*

Following the January 2, 2007 hearing, Mother and Father regularly visited Danielle, who referred to them as "mommy" and "daddy." The social worker described the visits: "Though the parent[]s appear to act in a parenting role at visits[,] their prior history with this child and her siblings indicate that without Social Services supervision this child's needs have not and will not be met and therefore they do not truly act in a parenting role. Their role is more of a friendly visitor."

On March 19, 2007, Danielle was placed in her maternal grandparents' home, where her three siblings had been placed. The maternal grandparents expressed willingness to adopt Danielle and gave her love and attention. The social worker stated in a May 3, 2007 report: "[Danielle] is receiving timely medical care and follow-up and is in the process of becoming current on her immunizations. She is a happy toddler enjoying safe, consistent, stable care in her prospective adoptive home. She is talking

[1] A court may deny reunification services under section 361.5, subdivision (b)(10) if the parent previously failed to reunify with a sibling or half sibling of the dependent child. A court may deny reunification services under section 361.5, subdivision (b)(13) if the parent has an extensive, abusive, and chronic history of use of drugs or alcohol, and, in the three-year period preceding the dependency case, the parent has failed or refused at least twice to comply with an available and accessible drug or alcohol treatment program described in the reunification plan.

more, and her vocabulary is increasing. She appears to be making great developmental progress. Danielle appears to enjoy living with her siblings and is thriving."

Mother progressed in her perinatal program. Her drug tests were negative, except for two in February 2007 for which no results had been received. The social worker acknowledged the "mother has taken steps since November of 2006 to address her drug use" and she was "unaware of any drug use by the mother."

On May 1, 2007, the date set for the section 366.26 hearing, Mother and Father each filed a section 388 petition requesting family reunification services. Mother asserted she had successfully completed two phases of her perinatal program, had produced negative drug tests since November 2006, was strongly bonded with Danielle, had a proper residence for her, and was working. SSA did not recommend granting Mother's petition. In an interim review report, the social worker stated, "[a]lthough . . . the mother currently enjoys a period of sobriety, given her lengthy history, it is very brief and tenuous."

Following a hearing on May 3, 2007, the juvenile court granted the section 388 petitions and ordered reunification services for both parents.

C. *Reunification Period*

In July 2007, the social worker reported that Danielle was developmentally on target and was "excelling" in preschool. She had a good bond with the maternal grandparents, minded them, and interacted well with her siblings.

Mother consistently visited Danielle. The maternal grandparents reported the visits went well, Mother seemed to be implementing parenting techniques learned from her classes, and Danielle seemed to have a "strong bond" with both Mother and Father. The maternal grandmother believed Mother was "'maturing.'"

Mother was in compliance with her case plan during the period up to the six-month review hearing on August 21, 2007. She graduated from the perinatal program

in July 2007. All her drugs tests were negative, except for missed tests on July 12 and 19, and a diluted test on August 27. Mother missed the July 19 test due to graduation from her perinatal program, but had no excuse for missing the July 12 test.

Father was doing well in his parenting classes, but in July 2007 started to cancel visits with Danielle. The social worker was unable to contact Father and learned in August that he was in Texas living with his mother. Father's last visit with Danielle was on July 22. He fell out of compliance with his case plan, ceased attending parenting classes, did not graduate from a substance abuse program, and had his last drug test on July 23. After moving to Texas, Father told the social worker he was "'O.K. with the baby going home with [Mother].'"

At the six-month review hearing on August 21, 2007, the court continued reunification services, approved the case and visitation plans recommended by SSA, and set a 12-month review hearing for December 19, 2007.

In September 2007, Mother started having overnight visits with Danielle at the maternal grandparents' home. The visits went well, although Mother felt somewhat overwhelmed because she was expected to be with her other children living with maternal grandparents. The social worker inspected Mother's apartment and approved overnight visits there with Danielle.

As of December 19, 2007, the date of the 12-month review hearing, Mother had no positive drug tests and one diluted test. Mother told the social worker she attended AA meetings, but did not provide proof of attendance.

In the status review report prepared for the 12-month review hearing, the social worker stated: "The mother attended a Family Reunification Team decision making [m]eeting on December 6, 2007. At that time we discussed the great efforts the mother has made in complying with the case plan. The mother successfully completed a Substance Abuse Program. [A]lthough she produced a diluted test and may have missed two tests in July, the mother has never produced a positive drug test in the time that she

has been testing for the Agency. The mother is aware that she needs to secure a child care facility before the child can be returned to her. At this time she is actively looking for a facility and waiting to hear from them. The undersigned is ready to begin a 60-day trial visit with the mother during this next period of supervision with the anticipation of the mother securing child care for Danielle."

On December 19, 2007, the juvenile court set the 12-month review hearing for January 15, 2008 as a contested matter.

As of December 19, 2007, Mother had been living with her boyfriend (not Father), who had never raised children. On December 20, Mother told the social worker she intended to break up with the boyfriend and live with a family friend to be closer to the maternal grandparents' house.

Mother had negative drug tests in January 2008. Mother also informed the social worker she had not been honest in claiming she had been attending AA meetings twice a week. Mother conceded she had not been attending AA meetings and could produce no proof of attending a meeting after December 19, 2007. In an addendum report dated January 15, 2008, the social worker expressed concern that "[M]other continues to not be fully complying with her case plan and that she is currently not living in a stable environment to consider returning the child to the mother's custody."

The 12-month review hearing was conducted on January 15, 2008. The court continued reunification services and scheduled an 18-month review hearing for May 9, 2008. (The 18-month review hearing was continued several times and ultimately was conducted on August 1, 2008).

In a status review report dated May 9, 2008, the social worker recommended terminating reunification services and setting a section 366.26 hearing. The social worker reported: "[Mother] has continued to maintain her sobriety from illegal drugs[,] however she submitted a positive test on February 07, 2008 for alcohol. The mother admitted to getting drunk and stated that she was frustrated with her mother,

the child's current caregiver. The mother continues to be inconsistent with her AA attendance and admitted to no longer having a sponsor although she d[o]es not under[stand] what they talk about during the AA meetings. The undersigned has asked the mother multiple times about her inconsistency and she continues to state, 'I'm just busy.'" The social worker believed Mother was determined to stay off illegal drugs but expressed concern "with her need to comfort her sorrows through alcohol" and was concerned that Mother was attending AA meetings only because she was required to do so under her case plan. Mother had delayed starting therapy until a month before the initially scheduled 18-month review hearing date.

Despite recommending termination of reunification services, the social worker was "willing to consider starting a 60-day trial with the mother and the child before the next Hearing" if Mother retained a sponsor, consistently attended AA meetings, participated in a 12-step program, and visited a therapist.

In an addendum report dated July 11, 2008, the social worker reported she recently had learned that in August 2007, Mother had been arrested for driving under the influence (DUI) and driving with a suspended license. Mother pleaded guilty to those offenses on February 29, 2008, just 15 days after her positive alcohol test. Mother admitted keeping this information from the social worker, telling her, "'you just want to find any reason to take my baby from me.'" Mother missed a drug test on July 1, claiming she did not understand a message she received about a new drug testing system. The social worker believed Mother refused to take responsibility, blamed others for her mistakes, and had a problem with alcohol. The social worker expressed concern for Danielle's safety. As a result, visits reverted to monitored visits at the maternal grandparents' home, and the social worker recommended termination of reunification services.

D. *Termination of Reunification Services and 60-day Temporary Release*

At the 18-month review hearing on August 1, 2008, the juvenile court terminated reunification services, authorized a 60-day temporary release of Danielle to Mother to begin on August 2, and authorized funding for drug testing for Mother, to be terminated if she tested positive or had a missed or diluted test.

In September 2008, the social worker reported Mother was complying with the case plan and the 60-day temporary release was going well. Danielle was doing well in Mother's home and appeared happy. The social worker believed, however, Mother had relapsed "in regards to alcohol" and was concerned about Mother's relationships with men. Mother had a new boyfriend and wanted to move to Arizona with him to help raise his children. The social worker wrote: "The mother has been involved in several relationships and has lived with three separate men over the past year and a half. Currently the mother lives with her new boyfriend whom the mother admits they have only recently started dating. The mother wants to move to Arizona and help raise this man's children when she has lost three of her other children to adoption and only recently had the child, Danielle, returned to her care." Nonetheless, the social worker recommended extending the temporary release for another 60 days.

On November 10, 2008, SSA submitted an ex parte application informing the court the 60-day temporary release for Mother had been terminated because she produced a diluted drug test on October 15. Danielle was removed from Mother's care and placed with the maternal grandparents.

In the ex parte application, the social worker stated: "On October 15, 2008, the mother contacted Senior Social Services Supervisor and informed her that she thought her urine sample would come back diluted. She asked the supervisor what she should do and the supervisor advised her that there was really nothing that the supervisor could do. The mother asked if she could go somewhere else or submit the sample twice. The supervisor told her to do what she felt she needed to do and told her that she could test

somewhere else if they allowed her to. On October 15, 2008, the mother produced a diluted drug test." The social worker noted Mother's creatinine level and specific gravity level were too low to be considered normal and produced a diluted test.

In the December 1, 2008 report for the section 366.26 hearing, SSA recommended termination of parental rights and a permanent plan of adoption.

E. *Mother's Section 388 Petition*

On December 1, 2008, the date set for the section 366.26 hearing, Mother filed a section 388 petition requesting the hearing be taken off calendar and Danielle be returned to her under a plan of family maintenance services. Although the section 388 petition technically challenged the August 1, 2008 order terminating reunification services, Mother states in the appellant's opening brief, "the order which mother was seeking to modify ostensibly was not the order terminating reunification services, but rather, it was the order removing Danielle from her custody on October 24, 2008."

Mother alleged in her petition: (1) she had been complying with her case plan; (2) she had been attending AA meetings and had enrolled in a drug outpatient program; (3) before the diluted test on October 15, 2008, she had no positive drug tests; (4) she had maintained her sobriety since February 7, 2008; (5) according to a December 2007 status review report, she had completed the perinatal program, and a positive drug test in August 2007 "was not a concern to the social worker"; (6) she consistently attended therapy and had made progress in her therapy sessions; (7) her overnight visits with Danielle since September 2007 had gone well and the visits "strengthened the bond between Danielle and me"; and (8) the 60-day temporary release had gone well and "only deepened the already strong parent-child relationship." Terminating parental rights, Mother asserted, "would be detrimental to Danielle."

F. *Combined Section 366.26 Hearing and Hearing on Section 388 Petition*

On December 1, 2, and 4, 2008, the juvenile court conducted a hearing on Mother's section 388 petition simultaneously with the section 366.26 hearing. Mother, social worker Isabel Loor, and supervising social worker Leslie Dale testified.

1. Mother's Testimony

Mother testified she did not eat anything and only drank water on October 15, 2008, the day of the diluted test. She took the test at 5:30 p.m. after working the entire day cleaning houses. Her sample appeared light in color, and she was told at the testing site her sample would be diluted. Mother explained she had been drinking water the entire day while working. Mother contacted her social worker's supervisor, who told her "it doesn't necessarily mean it's going to be diluted even though it's light." Mother did not believe a diluted test would be serious because the social worker's supervisor told her: "[D]on't worry about it. It will be okay. We're not going to take your daughter over that." Mother did not get another drug test that day.

Mother was told at the testing site that drinking too much water would produce a diluted test. She did not have an understanding of what a diluted test meant. Mother testified she did not recall being told at the 18-month review hearing on August 1, 2008 that a diluted test would result in termination of services.

Mother testified she started seeing her therapist on May 15, 2008 on a weekly basis. She was doing so well in therapy she started a biweekly schedule. She still attended AA meetings two or three times a week. She stopped attending outpatient substance abuse therapy on October 30, 2008 because the treatment center wanted her to attend four times a week rather than once. Mother claimed her social worker, Isabel Loor, told her in September 2008 that participation in substance abuse therapy was not mandatory.

Mother had overnight visits with Danielle four nights a week from February until the 60-day temporary release began in August. During the temporary release, Mother took Danielle with her to work, and bathed and fed her. When the temporary release ended, Mother visited Danielle at the maternal grandparents' home for eight hours a week. This schedule "wasn't going so well," so Mother started visiting two hours a week. At the start of each visit, Danielle would run to hug Mother, and at the end would tell the social worker she wanted to stay with Mother.

Mother testified about an altercation at the maternal grandparents' home in November 2008, in which she allegedly struck the maternal grandmother. Mother denied striking the maternal grandmother in that incident, claiming instead, "I restrained her because she closed the door on me as I was walking out." Mother acknowledged she "yelled and said some vulgar things that I should not have said." In therapy, Mother learned about the maternal grandmother's anger at her for "messing up."

2. Isabel Loor's Testimony

Isabel Loor testified she has been the social worker assigned to Danielle's case for about 18 months. Loor's opinion was that Mother had established a parent-child relationship with Danielle, but severing that relationship would not be detrimental to Danielle because she "currently resides with her siblings who[m] she's very, very close with, and she has been residing with the siblings and her maternal grandparents since 2007, . . . [with] whom she's very close."

Loor had spoken with a representative of a testing laboratory, who explained that in a diluted test, "there is something that is counteracting with the urine where they cannot test it, so it's not a negative or a positive." For a diluted test, the subject's creatinine levels are so low the sample is not considered a urine sample. Loor did not know whether drinking large quantities of water could cause a diluted test. Loor believed Mother had also produced a diluted test in August 2007.

Loor made the decision to terminate the 60-day temporary release and remove Danielle from Mother's care. She made that decision based on "the long history of this case," previous positive and diluted tests, the undisclosed DUI arrest and conviction, failure to consistently attend AA meetings, and the fact Mother stopped attending substance abuse therapy. Loor believed Mother had been given many chances, and had been told many times "no positive, no missed, diluted. Diluted test considered a positive test." Mother had not produced AA meeting attendance cards since August 2008 and had told Loor in the past that she did not get anything out of the meetings. Loor denied telling Mother she was not required to participate in substance abuse therapy.

Loor had no doubt that Mother and Danielle loved each other, but on observing Mother, the maternal grandmother, and Danielle together, Loor concluded Danielle looked to the maternal grandmother as her mother and primary caretaker. Danielle had to be coerced to leave the maternal grandmother to visit Mother, and did not seem upset when visits with Mother ended. Loor testified that Danielle did not want to go on the last two visits with Mother and said, "I want to stay here with Nana." Loor testified Danielle was happy to see Mother and hugged her good-bye when she left.

Loor testified she spoke by telephone with Mother immediately after the altercation with the maternal grandmother in November 2008. Mother, yelling, said the maternal grandmother choked her and she punched the maternal grandmother in self-defense. Mother had called from the maternal grandmother's house. Loor could hear children crying in the background and the maternal grandmother telling Mother "not to talk about this right now" and "you are to enjoy your visit." After Mother hung up the telephone, the maternal grandmother called Loor, told her the children were crying, and asked what she should do. Loor told the maternal grandmother to end the visit, and the maternal grandmother later informed Loor that she "removed the children from the situation." The maternal grandmother explained to Loor that Mother used threatening

language as she left. As the maternal grandmother tried to shut the door, Mother pushed the door open, grabbed the maternal grandmother, and punched her in the mouth.

3. Leslie Dale's Testimony

Leslie Dale testified she supervises Loor. Dale testified Mother telephoned her on October 15, 2008 from the drug testing site because she was concerned she would produce a diluted test. Dale asked, "why do you think you have a dilute test?" Mother answered, "it was very clear." Dale replied, "we don't test on color, there's other things they are testing for." Mother then said, "I want to go someplace else and they wouldn't let me go someplace else without your permission," but Dale responded, "going someplace else isn't going to do anything for you." Mother said she could wait an hour or two and let her urine become more concentrated. Dale said, "that's fine, if that's what you want to do. If you sit here longer, do what you want to do. Today is your [day] to test, so just go ahead and test."

Mother was concerned about producing a diluted test and wanted Dale to do something. Dale told Mother she could not do anything and "submit your sample, and that's all we can do." Dale told Mother she did not care whether Mother submitted the first sample or waited and submitted a second sample, and left the decision to Mother. Termination of the 60-day temporary release was not discussed. Dale was "[p]ositive" she did not tell Mother a diluted test would not cause Danielle to be removed and the 60-day temporary release terminated.

G. *The Juvenile Court's Ruling*

After hearing testimony and argument of counsel, the juvenile court denied the section 388 petition. The court found by a preponderance of the evidence SSA acted appropriately in removing Danielle from Mother's care based on the October 15, 2008 diluted test. In making this finding, the court considered the diluted test in context with all the facts of the case, including previous drug tests and Mother's DUI arrest and

conviction, and subsequent events. The court recognized the conflict between Mother's testimony and Dale's testimony, and stated it was "not persuaded by mother's testimony."

The court concluded that Mother understood the significance of a diluted test and called Dale seeking alternatives. One alternative offered by Dale was to wait at the testing site for several hours and submit a second sample, yet, the court stated, "there's no explanation put forth as to why that seems to be an option that was . . . not availing." The court found Mother's decision to end outpatient substance abuse therapy to be "a troubling event," and noted that Mother had worked cleaning houses throughout the summer without producing a diluted test. Mother understood a diluted test would be a problem, but also did not take advantage of the "readily available remedy" of waiting and submitting a second sample. The court stated: "The inference the court draws from that is that . . . the results would not have been favorable to mother had she in fact been able to produce the requisite test." The court also found, "the ongoing concerns as regards mother's sobriety are a basis upon which social services could and did remove the child from her care."

After hearing further argument and taking judicial notice of the case file, the juvenile court ordered parental rights terminated pursuant to section 366.26. The court stated Mother did not carry her burden of proving the parental benefit exception under section 366.26, subdivision (c)(1)(B)(i). The court found by clear and convincing evidence that Danielle is adoptable and none of the exceptions listed in section 366.26, subdivision (c)(1)(A) and (B) applied. The court was "mindful" of the relationship between Mother and Danielle, and accepted that as "a serious relationship and one entitled to protect," but concluded Mother had not met her burden of proving the relationship outweighed Danielle's interest in the permanence and stability adoption would provide.

Mother timely filed a notice of appeal from the order denying her section 388 petition and the order terminating her parental rights.

III.

DISCUSSION

A. *The Juvenile Court Did Not Abuse Its Discretion in Denying Mother's Section 388 Petition*

In denying Mother's section 388 petition, the juvenile court inferred from the evidence that Mother would have produced a positive drug test on October 15, 2008 if she had waited and submitted a second urine sample. Mother contends the juvenile court abused its discretion in denying her petition because that inference is speculative.

"Under section 388, the petitioner must show by a preponderance of the evidence either changed circumstances or new evidence and that the proposed modification is in the best interests of the child. [Citations.] The grant or denial of a section 388 petition is committed to the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is clearly established. [Citation.] A trial court exceeds the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. [Citation.]" (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.)

"An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (b).) "Whether the law will allow the trier of fact to draw an inference depends upon whether the court is persuaded that the proposed conclusion is a reasonable, logical, and nonspeculative deduction from the facts proved." (*S. C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 539, fn. 12.)

The testimony at the hearing established that, on October 15, 2008, Mother noticed her urine sample appeared light in color and was informed it likely would

produce a diluted test. Mother had been told several times a diluted test would be considered a positive test. Mother testified she did not understand the meaning of a diluted test and was told by Dale a diluted test would not result in Danielle's removal. But the juvenile court, in essence, found Mother not to be a credible witness on this point, and Dale testified she never told Mother a diluted test would not result in Danielle's removal and termination of the 60-day temporary release. As the juvenile court found, regardless whether Mother knew precisely the meaning of a diluted test, she understood a diluted test would be serious because she contacted Dale on concluding her urine might test diluted. Dale made clear that Mother had to test that day and gave her the option of waiting and submitting a second sample. No evidence was presented that Mother could not wait at the testing site and later provide a second sample.

A reasonable inference from those established facts is that Mother did not wait and submit a second sample because it would test positive. We are persuaded this is a nonspeculative deduction. Other inferences may be drawn from the facts, but """[w]hen two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."""" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 319.)

In denying the section 388 petition, the juvenile court considered, in addition to the diluted test, evidence of Mother's prior involvement with social services, her prior drug tests, the late-reported DUI arrest and conviction, and Mother's termination of outpatient substance abuse therapy. The court expressed concern over Mother's sobriety and lack of continuing commitment to rehabilitation. This evidence was sufficient to show lack of changed circumstances or new evidence justifying Mother's proposed modification; therefore, the juvenile court did not abuse its discretion in denying Mother's section 388 petition.

B. *Substantial Evidence Supported the Finding of No Parental Benefit Exception.*

In the order terminating parental rights, the juvenile court found the provisions of section 366.26, subdivision (c)(1)(A) and (B)(i)-(vi), including the parental benefit exception, did not apply. Mother argues substantial evidence did not support this finding, and asserts, "there is no indication that the interaction between [M]other and Danielle was anything but positive and beneficial to the child."

"When the juvenile court finds that the child is adoptable, it must terminate parental rights unless it finds one of four specified circumstances in which termination would be detrimental." (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 852.) Under the parental benefit exception, the juvenile court may decline to terminate parental rights if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

The parent bears the burden of proving termination of parental rights would greatly harm the child. (*In re Brittany C.*, *supra,* 76 Cal.App.4th at p. 853.) "[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The parent must show he or she has a parent-child relationship: "[T]he child's relationship must transcend the kind of relationship the child would enjoy with another relative or family friend." (*In re Jeremy S.* (2001) 89 Cal.App.4th 514, 523, disapproved on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396.) "Thus, a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forgo adoption in other to preserve parental rights in

the absence of a real parental relationship." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*).)

In *Jasmine D., supra,* 78 Cal.App.4th at page 1351, the court concluded the abuse of discretion standard of review governs a decision applying the parental benefit exception, but noted courts "have routinely applied the substantial evidence test" to the juvenile court's findings. As the *Jasmine D.* court explained, "[t]he practical differences between the two standards of review are not significant" because "'[e]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling.'" (*Ibid*.) Here, Mother only challenges the sufficiency of the evidence to support the juvenile court's finding the parental benefit exception did not apply; she does not argue the finding resulted from a misinterpretation of the law or was otherwise an abuse of discretion.

In reviewing the sufficiency of the evidence, "[w]e determine whether there is substantial evidence to support the trial court's ruling by reviewing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court's ruling." (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.)

As to the first part of the parental benefit exception, there is no question Mother maintained regular visitation and contact with Danielle. As to the second part, we conclude substantial evidence supported the juvenile court's implied finding Danielle would not benefit from continuing the relationship with Mother. (§ 366.26, subd. (c)(1)(B)(i).)

Loor, who had been the social worker assigned to Danielle's case for about 18 months, testified Mother had established a parent-child relationship with Danielle, but severing that relationship would not be detrimental to her. Loor testified Danielle was very close to the maternal grandmother and perceived her, not Mother, as her "primary caretaker" and as playing the maternal role. Danielle had to be "coerced" to visit Mother, and, though Danielle displayed affection toward Mother, she did not appear unhappy

when the visits ended. Mother's diluted drug test, late-reported DUI arrest and conviction, cessation of substance abuse therapy, and altercation with the maternal grandmother supported a finding that Mother had an ongoing substance abuse problem and posed a potential danger to Danielle.

In challenging the sufficiency of the evidence, Mother focuses on the juvenile court's comment that Danielle "seems equally attached to both [M]other and [F]ather" even though Father had not had the same contact with Danielle. Mother argues that comment reveals the juvenile court mistakenly relied on a statement made in an earlier SSA report to erroneously conclude Danielle could not have a strong emotional attachment to Mother. To the extent there is a conflict between the court's oral comments and written findings, the court's written findings and order control. (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 756, fn. 1; cf. *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451 ["Because we review the correctness of the order, and not the court's reasons, we will not consider the court's oral comments or use them to undermine the order ultimately entered"].) In the written order terminating parental rights, the juvenile court broadly found the "provisions of sec[tion] 366.26[, subdivision](c)(1)(A)[and](B)(i)(ii)(iii)(iv)(v)(vi) do not apply."

Moreover, the court's oral comments confirm that its observation of Danielle's relationship with Father was not the only basis or even the principal basis for finding no parental benefit exception. At the outset of its ruling, the juvenile court stated it was considering the evidence presented at the hearing on the section 388 petition. The court noted the information in the SSA reports, "including information related to the statements provided by the foster care provider dealing with the nature of the relationship."

Mother cites *In re S.B., supra,* 164 Cal.App.4th 289 for the proposition a child may have more than one parental figure, and, therefore, "even if Danielle looks to her grandmother as her primary caretaker, this does not negate the harm she will surely

endure if her relationship with [M]other is terminated." In *In re S.B.*, the Court of Appeal reversed an order terminating parental rights, concluding the juvenile court erred in not applying the parental benefit exception. (*Id.* at pp. 292-293.) The father had complied with every aspect of his case plan, which included maintaining sobriety and regularly visiting the child. (*Id.* at p. 293.) However, the father's poor physical and emotional health, caused by years of combat service in Vietnam, impeded his ability to care for the child full time and impaired his efforts to reunify. (*Id.* at p. 294.) The social worker testified the child would suffer detriment from terminating parental rights, but that detriment would be outweighed by the benefits of adoption. (*Id.* at p. 295.) The father had been the child's primary caregiver for three years. (*Id.* at p. 298.) A bonding study described the bond between the father and the child as "'fairly strong'" or "'moderate.'" (*Id.* at p. 295.) An expert witness testified the relationship between the father and the child "vacillated between parental and peer-like," and there was potential harm to the child in losing the parent-child relationship. (*Id.* at p. 296.)

The Court of Appeal rejected the argument the parental benefit exception does not apply unless the child has a "'primary attachment'" to the parent or the parent and child have day-to-day contact. (*In re S.B., supra,* 164 Cal.App.4th at p. 299.) The court too was "troubled" by an argument that any detriment to the child from the loss of the parent-child relationship would be "ameliorated by time and [the child]'s strong relationship with her grandmother," the prospective adoptive parent. (*Ibid.*) The fact a child has a strong and positive relationship with a caregiver does not "negate" the harm the child would suffer from loss of the parent-child relationship. (*Id.* at p. 300.)

In this case, Loor testified Mother and Danielle did have a parent-child relationship. But here, unlike *In re S.B.*, there was no bonding study or expert testimony regarding the strength of that relationship. Significantly too, Loor testified Danielle would suffer no detriment from termination of parental rights. She testified that Danielle had to be coerced to visit Mother, and, though Danielle seemed to enjoy visits with

Mother, she was not upset when they ended. Here, unlike *In re S.B.*, the evidence supported a finding that severing the parent-child relationship between Mother and Danielle would not deprive Danielle of "a substantial, positive emotional attachment such that [Danielle] would be greatly harmed." (*In re Autumn H., supra, 27* Cal.App.4th at p. 575.).

IV.

DISPOSITION

The order denying Mother's section 388 petition and the order terminating parental rights are affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.